

Environmental and Land Development ADVISORY

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Ninth Circuit Holds That Non-Settling Parties May Intervene in CERCLA Action to Challenge Proposed Consent Decree

On June 2, the Ninth Circuit Court of Appeals followed the Eighth and Tenth Circuits and ruled that a non-settling potentially responsible party, or PRP, may intervene in CERCLA litigation to oppose a consent decree incorporating a settlement that, if approved, would bar contribution from the settling parties.

The case espousing this decision—*United States, et al. v. Aerojet General Corp., et al.*, -- F.3d ----, 2010 WL 2179169 (C.A.9 (Cal.))—relates to a groundwater investigation and remediation in the San Gabriel Valley, California, that has been ongoing for nearly 30 years. In 2002, a group of 13 PRPs entered into a settlement agreement with several local water providers (“Water Entities”) to fund clean-up of volatile organic compounds in groundwater (“G13 Agreement”). Thereafter, in 2007, a sub-group of 10 PRPs entered into a separate agreement with the U.S. Environmental Protection Agency (EPA), the California Department of Toxic Substances Control and the Water Entities to address perchlorate contamination in groundwater (“G10 Agreement”).¹

In October 2007, EPA filed suit in the Central District of California against the settling PRPs, lodging a proposed Consent Decree that incorporated, among other issues, the G13 and G10 Agreements. The Consent Decree, if approved, would protect the settling PRPs from contribution claims by non-settling PRPs. Several non-settling PRPs sought to intervene in this litigation under Federal Rule of Civil Procedure 24(a)(2) and Section 113(i) of CERCLA, 42 U.S.C. § 9613(i), to protect their rights to contribution under CERCLA and to ensure that the consent decree embodies a fair and reasonable allocation of liability.

As the court noted, applicants for intervention of right pursuant to Rule 24(a)(2) must meet a four-pronged test:

(1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must

¹ The group of 13 settling PRPs became a group of 10 when two members applied successfully for “ability to pay” status (see CERCLA § 122(g)(7), 42 U.S.C. § 9622(g)(7)) and a third member declined to participate.

be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Aerojet, 2010 WL 2179169, at *4 (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006); see also FRCP 24(a)(1). CERCLA Section 113(i) provides a right to intervene in almost identical terms to Rule 24(a)(2). See 42 U.S.C. § 9613(i).

CERCLA Section 113(f)(1) establishes a right to contribution among PRPs. See 42 U.S.C. § 9613(f)(1). The dispute between the parties in *Aerojet* focused on whether this contribution right constitutes a "significantly protectable interest" sufficient to support intervention of right. Prior to the Ninth Circuit's decision, only two circuits had considered whether non-settling PRPs have interests sufficient to support intervention as of right; both the Eighth and Tenth Circuits concluded that they do. See *United States v. Albert Investment Co., Inc.*, 585 F.3d 1386 (10th Cir. 2009); *United States v. Union Elec. Co.*, 64 F.3d 1152 (9th Cir. 1995). Various district court decisions are split on the question.²

In *Aerojet*, the court held that CERCLA unambiguously affords non-settling parties a significant protectable interest supporting intervention of right:

As non-settling PRPs, Applicants in this case are potentially liable for response costs under § 107(a) of CERCLA, 42 U.S.C. § 9607(a). Section 113(f)(2) provides that approval of a consent decree will cut off their contribution rights under § 113(f)(1). The proposed consent decree in the EPA's suit against the Group of 10 will therefore directly affect Applicants' interest in maintaining their right to contribution. Further, because non-settling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, Applicants have an obvious interest in the amount of any judicially-approved settlement.

2010 WL 2179169, at *5.

The *Aerojet* court concluded, fairly summarily, that the amount that the 10 settling defendants were to pay would affect the amount that the non-settling PRPs would ultimately have to pay to satisfy their liability for response costs, and thus that the approval of the Consent Decree would impair or impede the interests of the non-settling PRPs.³ See *id.*, at *6.

In doing so, the court declined to address the implications of the Supreme Court's decision in *BNSF* last year, or its relevance to arguments by appellants that they had an interest in avoiding being "saddled" with unfunded "orphan" shares, as well as in protecting their contribution rights.

² Cf., *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 534-39 (C.D. Cal. 2004) (holding interest not legally sufficient to support intervention as of right), *United States v. ABC Indus.*, 153 F.R.D. 603, 607-08 (W.D. Mich. 1993) (same) and *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145-46 (D. Ariz. 1991) (same), with *United States v. Exxonmobil Corp.*, 264 F.R.D. 242, 246-48 (N.D. W. Va. 2010) (holding interest legally sufficient); *United States v. Acton Corp.*, 131 F.R.D. 431, 433-34 (D.N.J. 1990) (same).

³ The other two prongs of the test for intervention—the timeliness of the motion to intervene and whether the interests of those seeking to intervene are adequately represented by the parties to the action—were not seriously contested by the parties.

Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009). In *BNSF*, the Supreme Court held that, under CERCLA, where a defendant proves that there are distinct harms or that there is a “reasonable basis” for apportionment of harm, liability may be apportioned among multiple tortfeasors, rather than being joint and several. Under such a scenario, non-settlers may not have a right in contribution against settling parties, since the non-settlor(s) would not be forced to contribute a disproportionate amount to resolve its alleged liabilities.

Ultimately, the court recognized other decisions that have previously refused to allow non-settling parties to intervene based on CERCLA’s joint and several liability scheme and its policy favoring early settlements, but concluded that the plain language of the statute itself dictates in favor of allowing intervention, despite the existence of such policy arguments.

The case was remanded for further proceedings. Notwithstanding involvement in the proceedings by the intervening non-settling parties, the district court will, once again, retain broad discretion in determining whether the proposed consent decree embodies a fair and reasonable allocation of the settling parties’ liability under CERCLA.

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